

MEMORANDUM

To: Heidi

From: Cristina

Re: questions about transition from informal care to formal foster care

Date: September 14, 2010

Questions Presented:

1. Can the agency get reasonable efforts and contrary to welfare findings but keep the child in the same home of the relative?
2. How does removing a child from a parent's custody after the child has been in the informal care of a relative for over 6 months affect IV-E funding?

Question 1

When a child has been in the informal care of a relative (or non-relative caregiver) and court proceedings are then initiated against the parent, the agency can access judicial determinations of reasonable efforts and contrary to the welfare while keeping the child in a relative's home. The agency would be removing the child from the custody of the parent constructively, and the findings would address the reasonable efforts made to keep the child in the parent's custody (or why reasonable efforts did not need to be made) and the fact that remaining in the parent's custody would be contrary to the welfare of the child.

For a child to be eligible for federal financial participation (FFP) for foster care maintenance payments, two judicial determinations must be made early on in the case (among other eligibility criteria to be met). One finding is that reasonable efforts to prevent a child's removal from his/her home were made (or were not required to be made).¹ The other necessary judicial finding is that continuation in the home from which removed would be contrary to the welfare of the child.² Regulatory implementation requirements further clarify that this determination must be that the child's continued residence in the home would be contrary to his or her welfare or that "placement would be in the best interest" of the child.³

Additionally, federal regulations indicate that a child's removal must have been the result of a voluntary placement agreement or a "judicial order for the physical or constructive removal of the child from a parent or specified relative" in order to be eligible for FFP.⁴ The Administration for Children and Families of the U.S. Department of Health & Human Services (ACF) has indicated that "constructive removals" are, for example,

¹ See 42 U.S.C.A. §§ 671(a)(15), 672(a)(2); 45 C.F.R. § 1356.21(b).

² See 42 U.S.C.A. § 672(a)(2).

³ 45 C.F.R. § 1356.21(c).

⁴ 45 C.F.R. § 1356.21(k)(ii).

nonphysical, paper or legal removals.⁵ An ACF manual on Title IV-E funding describes constructive removals:

A child is considered to be *constructively removed* when a judicial ruling or voluntary placement agreement sanctions the child's removal from the parent or another individual, but the child is permitted to remain in the home of an interim caretaker.⁶

Additionally, when answering questions about “constructive” removals, ACF offered the below examples of living situations, among others. Although the child's eligibility for FFP differs in these summaries, both situations are examples of constructive removals offered by ACF:

The child lived with either a related or non-related interim caretaker for less than six months prior to the State's petition to the court for removal of the child. The State licenses the home as a foster family home and the child continues to reside in that home in foster care. The child is eligible for title IV-E foster care since s/he lived with the parent within six months of the State's petition to the court, and was constructively removed from the parent (i.e., there was a paper removal of custody).

The child lived with either a related or non-related interim caretaker for more than six months prior to the State's petition to the court. The State licenses the home as a foster family home and the child remains in that home in foster care. The child is ineligible for title IV-E foster care since s/he had not lived with the parent within six months of the State's petition to the court, and was not removed from the home of a relative. (Although constructively removed, the child is ineligible for title IV-E because it had been more than six months since the child lived with the parent.)⁷

This federal policy interpretation allowing for constructive removal of a child was instituted to allow a relative who had been acting as “interim caretaker” of a child to be eligible for Title IV-E funding while the child remained in that caretaker's home (as described in the above examples).⁸ That is, ACF recognized this informal family arrangement as a possible precursor to the initiation of court proceedings to remove a child from his/her parent's custody. And by condoning constructive removals and explaining their connection to Title IV-E funding eligibility, ACF also envisions that the required judicial determinations of reasonable efforts and contrary to welfare can still be made.

⁵ CW Policy Database – Policy Questions & Answers, 8.3A.11, Question 1, available at http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=38.

⁶ From ACF's Title IV-E Foster Care Eligibility Review Guide, MI-01-11, Ch.4: Eligibility Requirements, Removal from a Specified Relative, available at http://www.acf.hhs.gov/programs/cb/laws_policies/policy/im/2001/im0111a1d_2007.htm (emphasis added).

⁷ CW Policy Database – Policy Questions & Answers, 8.3A.11, Question 1, available at http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=38.

⁸ *Id.*

Judicial determinations in a case involving constructive removal should address the reasonable efforts made to prevent removal of the child from the *parent's* home or custody, as well as whether it was contrary to the child's welfare to remain in the *parent's* home or custody. Even though the child had been physically living with the relative/interim caretaker, if that person did not have formal custody of the child, the agency must remove the child from his/her parent's custody. Therefore, the agency need only explain why living in the parent's care and custody would be detrimental to the child. In place of a determination declaring that continuation in the parent's home is "contrary to the welfare" of the child, the federal regulations do also offer the option of finding that placement would be in the child's best interest;⁹ a court could employ that language if it or the agency is uncomfortable using the "contrary to the welfare" language given the family's arrangement.

Question 2

If a child has been in the continuous care of a relative for over six months before court proceedings (or a voluntary placement) are initiated, that child is not eligible for federal financial participation (FFP) in foster care maintenance payments. There does not appear to be any method of circumventing this six month rule in cases of informal care of children by relatives.

To be eligible for FFP, a child must have been "removed from the home of a relative specified in [July 16, 1996 AFDC rules]...."¹⁰ Implementation regulations further explain that to meet that requirement of having lived with a specified relative, a child must either have been physically removed from the parent's home or have lived with the parent within the six months of the initiation of court proceedings.¹¹ So even under a constructive removal from a parent, the agency cannot access FFP for a child who was living with a relative (or non-relative) caretaker for over six months.

This statutory and regulatory six-month eligibility rule has been confirmed through summary examples offered as technical assistance by ACF:

The child lived with a non-related interim caretaker for seven months before the caretaker asks the State to remove the child from his/her home and place in foster care. The child is ineligible for title IV-E foster care because s/he had not lived with a parent or specified relative within six months of the petition.

The child is in a three-generation household in which the mother leaves the home. The grandmother contacts the State agency four months later and the agency petitions the court within six months of the date the child lived with the mother in

⁹ 45 C.F.R. § 1356.21(c).

¹⁰ 42 U.S.C.A. § 672(a)(1).

¹¹ See 45 CFR § 1356.21(l); see also Title IV-E Foster Care Eligibility Review Guide – 2007, ACYF-CB-IM-01-11, Ch. 4: Eligibility requirements, p. 7 ("If the child was not living with that [parent] in the month of legal removal, the child...must have been living with the [parent] from whom legally removed at some time within the previous 6 months of removal....")

the home. The State licenses the grandmother's home as a foster family home and the child continues to reside in the home in foster care. The child is eligible for title IV-E foster care since s/he lived with the parent within six months of the State's petition to the court, and was constructively removed from the parent's custody.¹²

¹² CW Policy Database – Policy Questions & Answers, 8.3A.11, Question 1, available at http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=38.